MD. JAILANI TA'AT (MM83292)

v.

ZOOLKIPLIE HJ. ABDUL RAHMAN & ANOR.

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[CIVIL SUIT NO. 14 OF 1983]
21 JUNE 1989

TORT: *Liability - One of parties liable not party to proceedings - Contributory negligence - Section 12(1) Civil Law Act - Right of defendants to indemnity - Plaintiff excluded from computation of damages if not liable.*

The plaintiff in this case was a pillion rider on a motorcycle driven by PW5, a provisional licence holder who was not a party to these proceedings. The plaintiff is claiming against the drivers (the first and second defendants) of the two cars which collided into the motorcycle on which he was riding as a pillion rider. The Court, in assessing the liabilities of each of the parties to the proceedings, considered the question of whether the liability, if any, of PW5, who is not a party to these proceedings, should be taken into account when apportioning the award.

Held:

[1] Taking into account the circumstances of the case and the evidence as a whole, the Court found that the persons responsible for the cause of the accident were PW5, the first defendant and the second defendant.

[2] (a) The law on contributory negligence in this country is governed by s. 12(1) of the Civil Law Act 1956 (the Act).

(b) Under s. 12(1) damages should only be reduced by the Court after considering the claimant's share for the responsibility of the damage.

(c) In this case the plaintiff, as a mere pillion rider, was faultless and as such has the right to proceed against any or all of the persons responsible for the accident and it is entirely up to the person sued to seek any indemnity or contribution by joining others who had contributed towards the accident as co-defendant or third party. The plaintiff's claim is for damages suffered through the negligence of others and as such he does not fall within the definition of "any person who suffers damage as a result partly of his own fault" in s. 12(1) of the Act.

(d) On looking at the whole s. 12(1), it is clear that the Court has to assess the damage between those who have been found liable for it, and if somebody has not been found liable, he is excluded from the computation.

(e) The defendants are entitled to claim contributory negligence from PW5 only if PW5 had been joined as a party to these proceedings. The plaintiff has not been proved to be liable for any negligence and therefore no reduction of the damages recoverable by him should be made.

[3] In computing damages, the use of the Annuity Table and the straight multiplier system leads to the same assessment if the user appreciates that the latter and not the former method has taken into account contingencies involved for e.g., the life expectancy, prospective earning capacity and the pecuniary advantage in receiving future earnings in a lump sum.

[4] For the loss of prospective promotion, pension and gratuity, the Court deducted the plaintiff's present salary inclusive of all allowances from the maximum pay of a corporal and multiplied the figure so obtained with a multiplier of 18.

[5] In relation to post retirement loss of income, the prospect of employment after retirement from the public service is to be taken into consideration.

Cases referred to:
Mallet and Anor. v. Dunn [1949] All ER 973
Kow Ah Dek & Anor. v. K. Ratnasingam [1981] 2 MLJ 24

Legislation referred to:
Civil Law Act 1956, s. 12(1)
Law Reform (Contributory Negligence) Act 1945 [UK], s. 1(1)

For the plaintiff - Toh Chin Chong; M/s. Murphy & Dunbar
For the 1st defendant - A.C. Vohrah; M/s. Vohrah & Tan Chee Lan
For the 2nd defendant - Tan Hock Kim; M/s. Tan & Tan

JUDGMENT

Wan Yahya J:

On 24 January 1982 the plaintiff was a pillion rider on a Vespa No. JK 5102 driven by PW5 a provisional licence holder, who is not a party to this suit. At 8½ ms Umbai, Merlimau Road, Malacca they met with an accident. According to the rider (PW5) he was following the 1st defendant's car proceeding towards Muar when this car suddenly stopped causing him to collide against its rear portion. As a result of the collision the plaintiff was thrown towards an oncoming car driven by the 2nd defendant and he sustained serious injuries which led to the amputation of his leg. Just before the accident the plaintiff was preoccupied with the view of houses by the roadside. So he was not able to say how the accident had occurred.

The 1st defendant's version of the accident was that he had only applied his brake quickly when a White Datsun car in front of him made a left turn into a side lane, and it was at that moment when the motor Vespa hit the back bumper of his car. He blamed both the rider of the motor Vespa and the 2nd defendant for the accident.

The 2nd defendant contends that he was travelling at a speed of 40/50 kph on his correct side of the road when he saw the Vespa swinging out in an attempt to overtake the 1st defendant's car but on seeing this approaching vehicle had swung again behind 1st defendant's car. The Vespa collided into the front off side of his car as he was passing the 1st defendant's car.

The participants or contributors to the cause of this accident appear to be confined to the 1st defendant, the 2nd defendant and PW5 the rider of the Vespa on which the plaintiff was the pillion. I shall therefore consider briefly their individual part in the unfortunate episode to determine their respective liabilities, if any.

Now 1st defendant's evidence is that he was proceeding at 30-40 kph which he agreed was not his usual speed. Prior to the collision he was aware that the Vespa and one motor car was following him. He braked quickly. I am unable to accept that he was going at that speed. 30-40 kph is equivalent to about 19 to 24 mph. PW5 who had been following him must have mentioned a similar speed. If he had braked slowly and maintained his car in motion, as he claimed, just before the accident, the ensuing force of collision between the two vehicles

going in the same direction would not have been so great as to cause the dent on his rear bumper. Likewise the 1st defendant also stated that he had, besides applying the brake, changed from the 5th to the 3rd gear. In answer to my question he disclosed that he usually uses the 5th gear when he is driving at 80 kph. The fact that he was on the 5th gear before changing it into the 3rd convinced me that he was driving at a much faster speed than 30-40 kph i.e., about 80 kph. He also agreed that he did not give any signal of his intention to slow or stop the vehicle. These are the two factors which to my mind is the principal cause of the accident.

In my opinion the 2nd defendant too was going at a greater speed. If he had been driving at 50 kph which is about 30 mph he could not have been thrown off the road by a mere impact with a Vespa motor cycle. Likewise, even if he had applied his brakes at 30 mph that could not have caused his motor car to skid off the road for a distance of 125 ft 8 inches until his car came to rest against the wall of a house. (see G-K in A4 & A5)

In his evidence the 2nd defendant also disclosed that when he noticed the 1st defendant's car and the Vespa behind it, he did not see the car which was in front of the 1st defendant. I cannot rationalise how on a straight road at the scene his view of the front car could have been obstructed. In fact the front car could have obstructed his view of the 1st defendant's car. A possible explanation is that he was going so fast that by the time he arrived near the 1st defendant's car and noticed it, the front car had already turned into the side road. Travelling at a speed on a stretch of straight road even if unrestricted by speed limit is a negligent act in this particular case as the 2nd defendant himself had admitted that he did not brake or swerve for fear of hitting the many pedestrians nearby. Going at such speed which would endanger others in the event of an emergency stop is doubtlessly a dangerous act. In spite of the surrounding circumstances and PW5's attempt to overtake the 1st defendant's car he had gone on driving without slowing down or giving any warning of his approach.

PW5 the rider of the motor cycle is by no way blameless. According to his evidence he was following the 1st defendant at 50 to 60 ft but when asked to estimate the distance he pointed out at a distance of 25 ft. He had also previously said that he was going at 50 to 60 kph. Following another vehicle at that range itself is a negligent act as he could never have stopped his motor cycle in time to avoid a collision in an emergency especially so when he was only a provisional licence driver.

Having found each of these three persons to be responsible for the cause of the accident, I shall now proceed to assess their respective liabilities. In doing so I have to consider whether the liability of PW5 who is not a party to these proceedings should be taken into account when apportioning the award.

The law on contributory negligence in this country is governed by s. 12(1) of the Civil Law Act 1956 which is identical to s. 1(1) of the United Kingdom's Law Reform (Contributory Negligence Act 1945). The provisions of both read:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

It appears from the above section, damages should only be reduced by the Court after considering the **claimant's** share for the responsibility of the damage.

In *Mallet and Anor. v. Dunn* [1949] All ER 973, a married woman was injured through the negligence of the defendant. On the husband's claim for special damages, it was held that the husband's rights of action was not defeated by the wife's contributory negligence and that no reduction of this amount fell to be made under the Law Reform (Contributory Negligence) Act 1945.

The claimant in this case is the pillion rider and he is claiming against the drivers of the two cars which collided into the motor cycle on which he was riding pillion. Although some contributory negligence can be imputed on the rider, he as a mere pillion rider was faultless. As such he has the right to proceed against any or all the persons responsible for the accident and it is entirely up to the person sued to seek any indemnity or contribution by joining others who had contributed towards the accident as co-defendant or third party. The plaintiff's claim is for damages suffered through the negligence of others. It would not be correct to place him within the category of "any person who suffers damage as a result partly of his own fault" as stated in s. 12(1) of the Civil Law Act above.

Further support of this view can be found in the case of *Maxfield v. Liewellyn* at p. 1122 where Ormerod LJ stated:

> It appears to me that the Court must have regard to a person's responsibility for the damage having regard to the parties who are before the Court, whose share of the damage can be taken into account and who have had the opportunity of putting arguments for and against their share of blame and generally of being heard in the action.

and further at p. 1123, Upjohn LJ said:

> It seems fundamentally contrary to the ideas of justice as administered in these Courts that this Court should have to assess liability for an alleged negligence which has never been alleged against the party responsible.
>
> Furthermore, on looking at the whole section I think it is clear that what the Court has to do is to assess the damage between those who have been found liable for it, and if somebody has not been found liable, surely then he must be excluded from the computation.

For the above reason, I would hold that the defendants are entitled to claim contributory negligence from the rider PW5 only if PW5 had been joined as a party to these proceedings. On his own part the plaintiff has not been proved to be liable for any negligence and therefore no reduction of the damages recoverable by him should be made.

As between the two defendants I would assess their respective liabilities at 65% on the 1st defendant and 35% on the 2nd defendant. Their liabilities on damages in this case shall be correspondingly apportioned.

On the question of damages, I would assess that the plaintiff's chances of being a corporal is through normal incremental ladder from constable to L/Cpl. and 8 years thereafter from L/Cpl. to Cpl. and another 8 years to maximum. Therefore the full range of differential loss is only during his 42nd to 55th year i.e., 13 years or at most 15 years.

As regards this there are various contingencies which might occur especially so for personnel in the armed forces and in particular to the plaintiff's slim promotional prospects even if he was uninjured.

Under these circumstances a multiplier of 18 years of the Annuity Table is a fair formula to adopt in the assessment of his loss.

Mr. Tee, Counsel for the plaintiff had taken me through an interesting induction on the inequitability of resorting to the Annuity Tables instead of the straight multiplier method. To my mind the use of the Annuity Table and the traight multiplier system would lead to the same assessment if the user appreciates that the latter and not the former method has taken into account contingencies involved; such as the expectancy of the plaintiff's life, his prospective earning capacity and also the pecuniary advantage he would have obtained in receiving in advance his entire future earnings in a lump sum.

Such contingencies when considered will support the contention of an assessment based on 18 years multiplier.

For the purpose of the computation of damages, in particular the claim for loss of prospective promotion, pension and gratuity, I propose to deduct the plaintiff's present salary inclusive of all allowances from the maximum pay of a corporal (on the basis of his highest attainable rank) and multiply the figure so obtained with a multiplier of 18 from the actuary tables. It has been represented to me that the plaintiff at the time of the hearing was only 26 years old and therefore had the prospects of working for another 29 years. Accordingly I have been urged to calculate the loss over that period. I am unable to accept this proposition. It must be noted that the plaintiff could not have attained his maximum salary immediately. Assuming he passes his examination soon after the date of hearing he would still have to wait for 8 years to get the maximum salary of a Lance Corporal and another eight to qualify for the maximum pay obtainable by a Corporal. Therefore the prospect of his maximum attainable salary only comes after 16 years i.e., when he will be about 42 years of age. So his actual loss from the maximum attainable salary is only about 13 years. As against this, I have to take into consideration that there is also a progressive partial loss of salary over the same period as the plaintiff goes up his ladder of promotion. After taking into consideration his average intelligence and poor performance in the past, I would consider the actuary table of 18 years to be fair under those circumstances.

Loss of Prospective Promotion

The maximum emoluments of a police constable is RM620 while those of a corporal is RM780. Therefore there is a loss of RM160. In addition there is a difference of RM53 in the respective housing allowances and a further RM10 in the PFS allowance. But the PFS allowance is only temporary allowance payable to police personnel whilst on tour of duty on the Police Field Force. So the actual losses of the plaintiff is RM160 plus RM53 which will add up to RM213 or to the nearest round figure RM210. The figure at 18 years on the actuary table is RM29,457.75 say, RM29,458.

Loss of Prospective Pension

The plaintiff's maximum length of service in the police force is 444 months. So his pension as a Corporal based on the formula given by the Adjutant would be

1/600 x 444 x 780 = 577.18

and as a private

1/600 x 444 x 620 = 458.78

So his loss of prospective pension is about RM118.40 say RM120. I think it is fair to assume that he could enjoy his pension for at least 10 years. So the loss according to the actuary table is RM11,116.80.

Loss of Gratuity

Almost the same method except the formula of 1/20 is used in calculating the gratuity of a serving personnel. In this case what the plaintiff could get as a corporal is

1/20 x 444 x 780 = RM17,316.

and as a constable

1/20 x 444 x 620 = RM13,764.40

Therefore the loss in gratuity is RM17,316
- RM13,764.40

RM3,551.60 or RM3552

Post Retirement Loss of Income

As observed by Tun Salleh CJ as he then was in *Kow Ah Dek & Anor. v. K. Ratnasingam* [1981] 2 MLJ 24, the prospect of employment after retirement from the public service is to be taken into consideration. The plaintiff therefore should be entitled to some damages under the item for another 5 years but not at RM300 as his Counsel claimed. He is not by any means a cripple and there can be no absolute loss of his earning power. I would assess the loss at about RM100 per month which according to the actuary table will be RM5,196.

The summary of the entire award is as follows:

1.	General damages for pain & suffering (as agreed)	RM40,000
2.	Cost of prosthesis & maintenance (as agreed)	5,000
3.	Special damages (transport) (as agreed)	615
4.	Loss of future earnings	29,458
5.	Loss of post retirement earnings	5,196
6.	Loss of pension	11,116
7.	Loss of gratuity	3,552
	Total	94,937

In addition the plaintiff is also entitled to interest at 8% from the date of service of writ until the date of judgment in respect of the general damages and 4% from the date of accident in respect of the prosthesis and transport i.e., items 2 & 3. However there shall be no interest payable in respect of items 4, 5, 6 & 7 which are advance payments of future losses.

Also found at [1990] 2 CLJ 256